IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,

Appellant

v.

Roberto ARMENDARIZ,
Master Sergeant (E-8)
United States Marine Corps,

Appellee

ANSWER ON BEHALF OF APPELLEE

Crim. App. Dkt. No. 201700338

USCA Dkt. No. 19-0437/MC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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Certified Errors

I.

WHETHER THE LOWER COURT ERRED IN OVERTURNING THE MILITARY JUDGE'S ADMISSION OF EVIDENCE WHERE THE MILITARY JUDGE FOUND THE OFFICIAL WHO AUTHORIZED THE SEARCH WAS THE ACTING COMMANDER WITH FULL AUTHORITY AND CONTROL OVER THE REMAIN BEHIND ELEMENT, EXCEPT FOR AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT AND CONVENE COURTS-MARTIAL?

II.

WHETHER THE LOWER COURT ERRONEOUSLY APPLIED THE EXCLUSIONARY RULE UNDER MIL. R. EVID. 311(a)(3) BY FAILING TO APPROPRIATELY BALANCE THE BENEFITS OF DETERRENCE AGAINST THE COSTS TO THE JUSTICE SYSTEM, AND THEREBY ERRED IN OVERTURNING THE MILITARY JUDGE'S DECISION NOT TO APPLY THE EXCLUSIONARY RULE?

III.

WHETHER THE LOWER COURT ERRED IN FINDING THE GOOD-FAITH EXCEPTION DID NOT APPLY WHERE THIS COURT HAS, IN *UNITED STATES V. CHAPPLE*, 36 M.J. 410 (C.M.A. 1993), HELD THE EXCEPTION APPLIES EVEN WHEN THE INDIVIDUAL ISSUING THAT SEARCH AUTHORIZATION LACKED AUTHORITY UNDER MIL. R. EVID. 315(d)(1), AND HERE LAW ENFORCEMENT REASONABLY BELIEVED THE ACTING COMMANDER WAS AUTHORIZED TO ISSUE SEARCH AUTHORIZATIONS?

Statement of Statutory Jurisdiction

Master Sergeant Armendariz agrees with Appellant's statement of statutory jurisdiction.

Statement of the Case

Master Sergeant Armendariz agrees with Appellant's statement of the case.

Statement of the Facts

Lieutenant Colonel (Lt Col) BW was the commander of MWSS-373, and had been since 2015 (JA 93, 286). Major (Maj) CB had been the Executive Officer of MWSS-373 since 2014 or 2015 (JA 101, 286). In March of 2016, Lt Col BW deployed with the "Forward Deployed Element" (FDE) of MWSS-373 (JA 102, 286). Major CB remained behind with the "Remain Behind Element" (RBE) of MWSS-373 and claimed to be the "Officer in Charge" (OIC) (JA 99, 102, 106-07, 286). However, Maj CB and Lt Col BW agreed her "OIC" position was created internally within the squadron, not as a result of the Secretary of the Navy delegating her authority (JA 98-99, 107). Major CB also testified during a hearing in another case that even though Lt Col BW was deployed, he was the commander of MWSS-373 and she was the executive officer (JA 191, 193).

While Maj CB had authority to sign correspondence on Lt Col BW's behalf as "acting commander" and to make a variety of administrative decisions (JA 95, 102), she did not have authority to impose nonjudicial punishment, to convene

courts-martial, or to make any decisions related to military justice (JA 97).[1] Lieutenant Colonel BW also gave "amplifying instructions" to Maj CB with a checklist of things she was and was not authorized to do (JA 111-12). However, Maj CB threw it out (*Id.*).

The FDE of MWSS-373 did not become a separate unit from the RBE of MWSS-373 (JA 97-98). No general or flag officer approved any division of the squadron into two separate elements or detachments. Lieutenant Colonel BW continued to be Maj CB's reporting senior and the commander of MWSS-373 (JA 10, 93, 98, 106, 193).

On July 25, 2016, and at NCIS' behest, Maj CB ordered MSgt Armendariz to return to MCAS Miramar (JA 104-05, 109). She was aware he was accused of sexual assault, and NCIS wanted him to return (JA 104, 112). Major CB sat with the agents (not including SA BB) when she and two other individuals told MSgt Armendariz to return to MCAS Miramar, recording the times of phone calls and text messages to MSgt Armendariz (JA 105, 110). Master Sergeant Armendariz attempted to find out why he was being recalled, but Maj CB would not tell him why (JA 258).

[1] Maj CB testified that she signed military protective orders (JA 103). This was also an unlawful exercise of authority she did not have. SECNAVINST 5216.5D, para. 1-10a(3) (JA 70-71).

On that same day, Special Agent (SA) Isaac Perez requested and obtained a written Command Authorized Search and Seizure (CASS) authorization from Maj CB, who signed as "Acting Commanding Officer" (JA 197). Pursuant to the written and verbal search authorizations Maj CB issued, NCIS agents searched MSgt Armendariz's person, his office, wall locker, and vehicle, seizing multiple items as evidence (JA 110). They also searched the refrigerator and the ceiling tiles of MSgt Armendariz's office (JA 266).

There was no explanation for SA Perez's verbal request to search MSgt Armendariz's vehicle for the phone he saw plugged into the console, or why it was necessary when Maj CB was in her office coordinating with the agents for MSgt Armendariz's return to MCAS Miramar (JA 258). Major CB's written authorization permitted a search of MSgt Armendariz's vehicle for *only* the phone plugged into the console, and clothing *only* if they did not find the clothing worn during the alleged sexual assault in his office (JA 199). Master Sergeant Armendariz was not allowed to drive home in his vehicle; CWO2 CC drove him home (JA 262).

On July 26, 2016, SA Perez requested another CASS to seize and search an iPhone with a cracked screen (JA 261-64). This request was based on information that during the drive to MSgt Armendariz's residence, he asked CWO2 CC to drive in a different direction to a spot outside of MCAS Miramar to retrieve a phone (JA

262-63). According to CWO2 Campbell, MSgt Armendariz exited the vehicle and when he returned, he had an iPhone with a cracked screen (JA 263). Master Sergeant Armendariz made four phone calls during the drive to his house (*id*.). Chief Warrant Officer 2 CC dropped MSgt Armendariz off at his off-post residence that night, but when he saw MSgt Armendariz the next morning, he did not have a phone on him (*id*.). Major CB signed another CASS authorizing SA Perez to search for and seize MSgt Armendariz's phone for "obstruction of justice" (JA 260). Agents used the July 26, 2016 CASS to search and seize a Samsung Galaxy phone instead (JA 5). No iPhone with a cracked screen was ever recovered, nor did the agents seek any warrants from civilian authorities to search MSgt Armendariz's off-post residence.

The evidence agents seized included multiple pairs of MSgt Armendariz's underwear from both his wall locker and his vehicle; DNA swabs of the MSgt Armendariz's hands, fingernails, penis, scrotum, hair, and pubic hair; and his cell phones. However, NCIS agents did not seize all of the underwear in his wall locker, nor did they seize the t-shirt he was wearing, which was draped over the wall locker door (JA 223-30). Master Sergeant Armendariz's clothing was sent to U.S. Army Criminal Investigation Laboratory (USACIL) for testing (JA 270, 274-75).

At the time of the July 25-26, 2016 authorization requests, Lt Col BW was in Kuwait with his own office (JA 98-99). He had access to fax, internet, phone, email and was able to be contacted the same as if he was physically located at MCAS Miramar (*Id.*). In fact, Major CB regularly communicated with Lt Col BW during his deployment (JA 116).

Special Agent Perez, the agent who requested the July 25-26, 2016 authorizations, and who participated in the execution of the authorizations, has a history of Fourth Amendment violations that resulted in the suppression of evidence in another case at MCAS Miramar. *United States v. Tienter*, 2014 CCA Lexis 700 (N-M Ct. Crim. App. Sep. 23, 2014) (unpub. op.).

Master Sergeant Armendariz's cell phones were subsequently searched, and data was seized from two of the three phones. An iPhone 6 was password protected and could not be searched as a result (JA 5). The iPhone 4 had not been used since 2013 (*Id.*). The third phone, the Samsung Galaxy phone seized on July 26, 2016 pursuant to the July 26, 2016 CASS Maj CB issued, was searched on August 12, 2016, which "yielded negative results pertinent to this investigation" (JA 209). Nevertheless, the agents submitted this phone for further forensic analysis, which indicated a "factory reset" occurred on July 26, 2016 (JA 5, 122-23). A "factory reset" indicates the phone is either new, or is a previously used phone that is received in "factory reset mode" (JA 122-23). Master Sergeant

Armendariz had purchased this Samsung Galaxy phone on July 26, 2016, as a result of having his other phones seized as evidence (Defense Exhibit A).

In August 2016, trial defense counsel in another case challenged Maj CB's authority as an "acting commander" when she referred charges against another Marine to trial (JA 6, 190-96). During a hearing on the propriety of her referral of charges, Maj CB testified that she signed the referral at the direction of Lt Col BW (JA 191). She identified herself as the Executive Officer of the MWSS-373 (*id*.). She also testified that although he was deployed, Lt Col BW remained the commander of the MWSS-373 (JA 193). She had not assumed command from him (*id*.). The military judge in that case found command had not devolved to Maj CB (JA 195).

Lieutenant Colonel BW returned from his deployment on or about October 5, 2016 (JA 96). However, it was not until November 18, 2016—nearly four months after the NCIS agents executed the July 25-26, 2016 search and seizure authorizations—that SA BB sought and received new authorizations from Lt Col BW to search and seize the same evidence agents had already seized and searched as a result of Maj CB's July 25-26, 2016 authorizations (JA 203-05). Special Agent BB's affidavit, if she provided one, is not included in the record. There is no evidence SA BB informed Lt Col BW that the search of MSgt Armendariz's Samsung Galaxy phone on 12 August 2016 met with negative results (JA 23).

Additional facts necessary to address the certified issues are contained in the arguments below.

Argument

I.

THE LOWER COURT DID NOT ERR IN OVERTURNING THE MILITARY JUDGE'S ADMISSION OF EVIDENCE BECAUSE THE MILITARY JUDGE'S RULING THAT MAJ CB WAS THE "COMMANDER" OF THE RBE WAS ERRONEOUS IN FACT AND LAW.

Standard of Review

This Court reviews a Court of Criminal Appeals' decision for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000). "An abuse of discretion occurs when the Court of Criminal Appeals makes findings of fact that are clearly erroneous or not supported by the record, or bases its decision on an erroneous view of the law." *Id*. (quoting *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997)). In reviewing the lower court's ruling, this Court must "consider the evidence in the light most favorable to the prevailing party" at the lower court—MSgt Armendariz. *See United States v. Eppes*, 77 M.J. 339, 344 (C.A.A.F. 2018).

Appellant also argues for an "abuse of discretion" standard. (Gov. Br. at 17). However, Appellant is arguing this Court should bypass the NMCCA's decision and review the military judge's decision directly (*id*.), essentially applying

a *de novo* standard to the NMCCA's *entire* decision and to overturn it if this Court agrees with the military judge instead of the NMCCA. Appellant relies on *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006) to support this proposition (*id*.).

Direct review of the military judge's ruling in MSgt Armendariz's case is not appropriate because the NMCCA's decision, not the military judge's, is the decision certified for review by this Court. To bypass the NMCCA's decision and directly review the military judge's ruling in this case would result in this Court not addressing the certified issues. For this reason alone, this Court should rely on *Armstrong*, which involved a certified issue, instead of *Shelton*, which involved a grant of review. *See also United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992) (Court of Military Appeals reviewing a certified issue by the Air Force Judge Advocate General whether to apply the good-faith exception to a commander's search and seizure authorization).

Even if this Court directly reviews the military judge's decision, this Court should nevertheless affirm the NMCCA's decision. The military judge's findings of fact were clearly erroneous; he was not aware of SA Perez's history of flagrant Fourth Amendment violations; he failed to address the Fourth Amendment violations that were apparent in the July 25-26, 2016 authorizations; and he failed to reconcile inconsistencies in Lt Col Ward's testimony about the scope of Maj CB's authority (JA 9). In addition, the military judge's failure to consider service

regulations in finding Maj CB was a "commander" demonstrates his clearly erroneous view of the law. It was also clear that, despite the military judge's claims, he did not understand the distinction between "designation," "delegation," and "devolution" (JA 137-138). These are distinctions with a difference.

Piercing a lower court's ruling to directly examine a military judge's ruling is only appropriate in three situations, none of which exists here. First is when a lower court affirms a military judge's ruling on a motion to suppress. *See United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015) (directly reviewing the military judge's decision denying a motion to suppress for a Fourth Amendment violation, but reversing the Army Court's decision to affirm the military judge's ruling). Second is when a lower court fails to explain its rationale for affirming a military judge's decision, or summarily affirms a case. *See United States v. Meghdadi*, 60 M.J. 438, 441 (C.A.A.F. 2005) (citing *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996)). Third is when this Court reviews an interlocutory appeal filed by the Government under Article 62, UCMJ. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citing *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011)). These are also distinctions with differences.

Appellant's incorrect reliance on *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004), for the proposition that the NMCCA was prohibited from finding facts contrary or in addition to the military judge's findings of fact (Gov. Br. at

23), demonstrates why it is inappropriate to directly review the military judge's decision in MSgt Armendariz's case. *Gore* was a result of a Government interlocutory appeal pursuant to Article 62, UCMJ, where the service court is prohibited from engaging in fact-finding outside of those found by the military judge.[2] 60 M.J. at 178 (citing *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)). In MSgt Armendariz's case, this Court is reviewing the NMCCA's decision as a result of an appeal pursuant to Article 66, UCMJ, where additional and supplemental fact-finding is permitted.

Furthermore, as Appellant acknowledges (Gov. Br. at 23), an appellate court is not bound by a military judge's findings of fact if they are not supported by the record or are clearly erroneous. *Gore*, 60 M.J. at 185 (citing *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981)). The NMCCA correctly pointed to multiple findings of fact that were not supported by the record or that were clearly erroneous (JA 9-10). The NMCCA also correctly noted that the military judge's failure to resolve inconsistencies in testimony resulted in findings of fact that contradicted each other (*id*.). This includes a failure to resolve the inconsistencies between Maj CB's testimony in the other Marine's case, when she acknowledged Lt Col BW was always the commander of MWSS-373 and she never assumed

[2] Notably, the Government argued in *Gore* that the service court "did not engage in additional fact-finding, but rather made logical inferences and conclusions based on the military judge's findings of fact." 60 M.J. at 184.

command (JA 193), and her testimony in MSgt Armendariz's case, when she claimed to be the "acting commander" of the RBE (JA 102). Regardless, even if the military judge's findings of fact were technically correct in MSgt Armendariz's case, his conclusions of law, namely that Maj CB was a "commander" qualified to authorize searches and seizures of evidence (JA 292-294), were incorrect, which the NMCCA reviewed correctly under a *de novo* standard of review.

None of these situations, where this Court bypasses a lower court's analysis to review a military judge's ruling directly, applies to MSgt Armendariz's case. The Government is appealing the NMCCA's decision that originated from MSgt Armendariz's Article 66, UCMJ appeal, not an interlocutory appeal file by the Government pursuant to Article 62, UCMJ. The NMCCA's decision overruled the military judge's, and the NMCCA thoroughly explained its rationale for overruling the military judge's decision in a well-reasoned published opinion. Its opinion is correct, supported by the facts and the law, and reasonable. In short, the NMCCA did not abuse its discretion in overturning the military judge's decision.

"The abuse of discretion standard calls 'for more than a mere difference of opinion. The challenged action must be arbitrary..., clearly unreasonable, or clearly erroneous.'" *Wicks*, 73 M.J. at 98 (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (internal quotations omitted)). The NMCCA's decision was not arbitrary or erroneous, and was reasonable. Accordingly, even if this

Court disagrees with the NMCCA's decision, that disagreement is not a basis for this Court to reverse it. *Wicks*, 73 M.J. at 98.

Argument

"A search authorization may be authorized by a Commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command…." Mil. R. Evid. 315(d)(1). A "'commander' is 'a commissioned officer in command or an officer in charge….'" R.C.M. 103(5). "'Officer in charge' [OIC] means a 'member of…the Marine Corps…designated as such by appropriate authority.'" Article 1(4), UCMJ. Authority to grant search and seizure authorizations cannot be delegated. *United States v. Law*, 17 M.J. 229, 240 (C.M.A. 1984);[3] *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981); SECNAVINST 5216.5D, para. 1-10a(3) (JA 69-70); Marine Corps Manual, para. 1007.1 (JA 71).

An officer can assume command in one of two ways: designation or devolution. U.S. Navy Regulations 0722-0723, 0803, 1026 (JA 65-68). Because Maj CB was not properly designated as a commander nor had command devolved to her, she did not have authority to grant search and seizure authorizations.

[3] In *Law*, the search at issue, which was authorized by the company executive officer pursuant to a delegation of authority by the company commander, occurred before this Court's decision in *Kalscheuer*, which did not apply retroactively. 17 M.J. at 240.

A. Major CB was not designated as a commander.

Only a flag or general officer, officer with general court-martial convening authority, or the senior officer present may designate an officer as a "commander" of a separate or detached command. U.S. Navy Regulation 0723 (JA 66). Only a flag or general officer can determine an officer's eligibility to command. U.S. Navy Regulation 0803(2) (JA 67). Additionally, in order to properly designate an officer as a commander of enlisted personnel, the designating authority must notify the Judge Advocate General and the Commandant of the Marine Corps. U.S. Navy Regulation 0722(1) (JA 65). This did not occur (JA 13). Certain authorities, such as court-martial convening authority, can be withheld by a superior authority in a "designation" of command authority. R.C.M. 401(a). But Maj CB was not "designated" as a "commander," and Lt Col BW was not a "superior" authority to her. In MSgt Armendariz's case, the Government's argument that Maj CB was competent to authorize searches and seizures hinges on "devolution," discussed *infra*, not "designation."

Furthermore, in order for Maj CB to "command" the RBE, the RBE must have been formally established *as its own independent unit* in accordance with Navy regulations. U.S. Navy Regulation 0804 (JA 67). There is no dispute the RBE was not formally established as a separate, independent unit (JA 97-98). Instead, the RBE remained part of the MWSS-373, commanded by Lt Col BW

(*id*.). Because the RBE was not established as a separate, independent unit in accordance with Navy regulations, Maj CB was not in "command" of the RBE, and therefore could not "function" as a "commander" of the RBE. Accordingly, she was not "serving in a position designated by the Secretary of the Navy," as required by Mil. R. Evid. 315(d)(1), and therefore not a "commander," "acting commander," or "OIC" authorized to grant search and seizure authorizations.

Maj CB was not "designated" as a "commander" or an OIC because she was not designated as a "commander" in accordance with service regulations, and the RBE was not established as its own independent unit in accordance with Navy regulations. Accordingly, she had no authority to authorize the July 25-26, 2016 searches and seizures at issue in this case.

B. Command did not devolve to Major CB.

Devolution of command is all-or-nothing. If the officer succeeding command does not possess *all* of the authorities held by his or her predecessor, then the officer is not a "commander" by devolution. *United States v. Bunting*, 15 C.M.R. 84, 87-90 (C.M.A. 1954); U.S. Navy Regulations 0803(1), 1026(1) (JA 67-68); Marine Corps Manual, para. 1007.2; JA 137-138. In fact, inherent in the office of command is the authority to initiate or apply authorized disciplinary measures. Marine Corps Manual, para. 1006.1.d. There is no dispute Lt Col BW had court-martial convening and nonjudicial punishment (NJP) authorities and Maj

CB did not. The fact that Maj CB did not possess the same authorities as Lt Col BW demonstrates that command did not devolve to her.

The NMCCA had an obligation to review Navy Regulations to determine if Maj CB exercised her own authority as "acting" commander because that is what this Court did in *Kalscheuer*, 11 M.J. at 377. Therefore, contrary to the Appellant's assertions (Gov. Br. at 23), the NMCCA properly applied *Kalscheuer*. Furthermore, cases relied upon in *Kalscheuer* also reviewed service regulations to determine if command authority properly devolved to the person who exercised command authority. *United States v. Murray*, 31 C.M.R. 20, 23 (C.M.A. 1961) (upholding a search conducted by a "commanding officer"); *United States v. Williams*, 19 C.M.R. 369, 373 (C.M.A. 1955) (deputy commanding general was the acting commanding general pursuant to AR 600-20 when he took final action on the case); *Bunting*, 15 C.M.R. at 87-89 (Navy regulations provided for the chief of staff to succeed command such that he could convene general courts-martial during the commanding officer's absence); *United States v. Bradley*, 50 C.M.R. 608, 617-18 (N.M.C.M.R. 1975) (command authority devolved to executive officer under Navy regulations when the commanding officer of the ship was ashore and his whereabouts unknown, even though the commanding officer was in the same geographical location); *United States v. Azelton*, 49 C.M.R. 163, 166 (A.C.M.R.), *pet. rev. denied*, 49 C.M.R. 889 (C.M.A. 1974) (noting Army Regulation 600-20,

Chapter 3, provided for devolution of command); *United States v. Gionet*, 41 C.M.R. 519, 520 (A.C.M.R. 1969) (command authority to executive officer did not devolve, as the company commander's attendance at a meeting 50-100 yards away was not a "temporarily absence" under AR 600-20). If devolution occurred in accordance with the service regulation, then the courts upheld the authority exercised. *Kalscheuer*, 11 M.J. at 377; *Murray*, 31 C.M.R. at 23; *Williams*, 19 C.M.R. at 373; *Bunting*, 15 C.M.R. at 87-89; *Bradley*, 50 C.M.R. at 617-18; *Azelton*, 49 C.M.R. at 166. On the other hand, if devolution did not occur in accordance with the service regulation, then the courts did not uphold the authority exercised. *Gionet*, 41 C.M.R. at 520.

Reviewing the relevant Navy and Marine Corps regulations governing devolution of command, Major CB did not "succeed" Lt Col BW under any circumstances. Command did not devolve to her by virtue of Lt Col BW's "transfer, death or incapacity," as he was not transferred, did not die, nor was he incapacitated. U.S. Navy Regulation 1026 (JA 68); Marine Corps Manual, para. 1007.2.a. Lieutenant Colonel BW was not detached without relief, nor did he depart on leave. U.S. Navy Regulation 1026 (JA 68). Major CB did not succeed command due to Lt Col BW's "absence," because he was not "absent" from his unit. The NMCCA correctly found Lt Col BW remained with the majority of his unit, the MWSS-373, which remained *one* unit (JA 15-16). Lieutenant Colonel

BW maintained his court-martial convening and NJP authorities over *all* servicemembers of the MWSS-373, including MSgt Armendariz, during his deployment. Even Maj CB acknowledged in another case that Lt Col BW remained the commander of the MWSS-373 throughout his deployment, she remained the squadron's executive officer, and that she was not the "commander" (JA 191-93). The NMCCA correctly held that the source of Maj CB's "authority" to grant search and seizure authorization derived from an unlawful delegation of authority by Lt Col BW, not a lawful devolution of command.

The Government's argument that Maj CB "functioned" as a commander because she oversaw various administrative and operational details of the RBE (Gov. Br. at 22), and therefore did not need to "fully function" as a commander for authority to devolve to her, is misplaced. Devolution of command authority requires the successor to assume *all* of the authorities of the commander from whom authority devolves. *Bunting*, 15 C.M.R. at 87-90. Thus, if a subordinate is not authorized to perform *all* of the functions of the predecessor commander, then that subordinate has not assumed command via devolution. *Id*. There is no dispute Maj CB did not possess three key functions that Lt Col BW possessed as a commander: (1) she did not have her own unit to command; (2) she did not have NJP authority; and (3) she had no authority to convene courts-martial. In particular, her lack of authority to initiate and apply authorized disciplinary

measures, such as NJP, which is inherent in the office of command, precludes her from "functioning" as a "commander." Marine Corps Manual, para. 1006.1.d. Additionally, evidence, Lt Col BW and Maj CB's testimony, showed that Lt Col BW continued to function as the commander for the MWSS-373, including the RBE, when he directed Maj CB to sign the charge sheet to refer another Marine's case to court-martial (JA 191-96).

The Government argues that Lt Col BW "withheld" NJP authority from Maj CB because Lt Col BW did not have authority to grant NJP authority to her (Gov. Br. at 5). This argument is incorrect for two reasons. First, a commander cannot "withhold" authority that he is not authorized to "grant." Second, if Maj CB had actually succeeded Lt Col BW as the commander, whether through devolution or designation, then Lt Col BW is not her "superior" commander. Instead, Maj CB is Lt Col BW's "replacement," so her command authority would necessarily include *all* of his authorities, including NJP and court-martial convening authority. U.S. Navy Regulation 1026 (JA 68); Marine Corps Manual, para. 1007.2.d. Accordingly, Lt Col BW would not have any authority to "withhold" any NJP authority from Maj CB, due to the services' requirement for a successor commander to have the exact same authority as the one being succeeded. *Id*.

The "delegation letter" Lt Col BW gave to Maj CB did nothing to establish her as a "commander." First, this was a "delegation" letter; authority to grant

search and seizure authorizations cannot be "delegated." *Kalscheuer*, 11 M.J at 376. Second, the authorization to sign correspondence as "acting commander" for Lt Col BW did not include authority to sign military justice actions. SECNAVINST 5216.5D, para. 1-10a(3) (JA 70-71). Third, the letter did not make Maj CB an "acting commander" (JA 196). Instead, as Maj CB acknowledged during her testimony in another Marine's court-martial that she remained the executive officer of the battalion, with her authority to sign as "acting commander" limited to correspondence (JA 191-93). Appellant cites no case law to support its position that authority to sign correspondence as "acting commander" also provides authority for an executive officer to command a non-existent unit, or to be recognized as a "commander" or "OIC" as defined by Article 1(3)-(4), UCMJ.

For the reasons set forth in the NMCCA's opinion (JA 9-10, 13-16), the military judge's findings of fact and conclusions of law regarding Maj CB's status were clearly erroneous. His failure to consider any service regulations in determining whether command "devolved" to Maj CB, or whether the RBE was a *bona fide* independent unit, is sufficient in and of itself to render his conclusions of law erroneous. In addition to the erroneous findings of fact identified in *Armendariz*, the military judge erred in finding Maj CB was an acting commander of the MWSS-373 (JA 294). The MWSS-373 remained one unit with one commander—Lt Col BW (JA 14).

With today's advances in communication capabilities, this case offers this Court an opportunity to reconcile *Kalscheuer* with the significant developments in technology. Lieutenant Colonel BW was reachable almost instantaneously, even half-way around the world during his unit's deployment. *Kalscheuer* focused on the base commander being unavailable due to being *incommunicado*. The new base commander, who had not delegated his search authority to the deputy base commander, was away from the installation and left his portable two-way radio with the deputy base commander, which was considered a symbol of "command authority."[4] *Id*. at 376, 379.

Based on the circumstances that the base commander was *incommunicado*, and there was objective evidence he had designated the deputy base commander to act in his stead by virtue of leaving his portable two-way radio with him, this Court held the deputy base commander *was* the commander at the time the search authorization was requested. *Id*. at 379-80. This Court also factored in its recent mandate that delegation of search and seizure authority was no longer permitted. *Id*. at 380. The mandate was not retroactive, and the base commander's predecessor had lawfully delegated authority to authorize search and seizures to the deputy base commander. *Id*. at 376, 380.

[4] In this century, military courts can look for objective evidence to support a "devolution" of command such as having the commander's cell phone, assumption of command orders (JA 193); or an assumption of command ceremony.

As seen in *Kalscheuer*, this Court's determination that the base commander was "absent" did not relate to physical separation from the installation he commanded; it related to him being *incommunicado* at the time an authorization was needed. Adding in the fact that the base commander left with the deputy commander the ultimate "symbol" of command authority, the portable two-way radio, this Court correctly characterized the temporary change in command as one of devolution instead of delegation.

In *this* century and in *this* case, even though Lt Col BW was half-way around the world, he was not *incommunicado*. As Lt Col BW acknowledged, on July 25-26, 2016, he was in Kuwait, where he had his own office with full communication capabilities—including phone, internet, and fax (JA 98-99). Major CB was able to, and did in fact, contact Lt Col BW on a regular basis (JA 95, 102). In fact, she discussed this case with him (JA 116). They also discussed the other Marine's case while Lt Col BW was in Bahrain or Kuwait (JA 191), wherein Maj CB referred the case to a special court-martial (JA 191-96). Her referral of charges to a court-martial on Lt Col BW's behalf in another Marine's case was not a result of a "back brief," but rather was a result of his direction before she signed the charge sheet (JA 191-96). She acknowledged during her testimony in that other case that, even though Lt Col BW was deployed, he was still the commander of the entire squadron, MWSS-373, of which the RBE remained a part (*id*.).

Lieutenant Colonel BW was accessible and could have been contacted directly during July 25-26, 2016 to approve the requested search and seizure authorizations. The agents and Maj CB chose not to contact him. And if commanders cannot "handle this task and so must delegate their search authority, then perhaps Congress should reexamine the role of commanders in military justice." *Kalscheuer*, 11 M.J. at 378.

II.

THE LOWER COURT CORRECTLY APPLIED THE EXCLUSIONARY RULE UNDER MIL. R. EVID. 311(a)(3) BY APPROPRIATELY BALANCING THE BENEFITS OF DETERRENCE AGAINST THE COSTS TO THE MILITARY JUSTICE SYSTEM, THEREBY CORRECTLY OVERTURNING THE MILITARY JUDGE'S DECISION NOT TO APPLY THE EXCLUSIONARY RULE.

Standard of Review

This Court reviews a Court of Criminal Appeals' decision for an abuse of discretion. *Armstrong*, 54 M.J. at 54. This Court cannot pierce the NMCCA's decision to review the military judge's decision directly because the military judge did not conduct *any* analysis to support his conclusion that the exclusionary rule should not apply (JA 23).

Argument

"Evidence obtained as a result of an unlawful search or seizure…is inadmissible against the accused if… exclusion of the evidence results in

appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." Mil. R. Evid. 311(a)(3).

The purpose of the exclusionary rule is to "deter lawless conduct by federal officers" and "by closing the doors of the federal courts to any use of evidence unconstitutionally obtained." *Brown v. Illinois*, 422 U.S. 590, 599 (1975) (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). By excluding unlawfully obtained evidence, the exclusionary rule compels "respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Brown*, 442 U.S. at 599-600 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). The exclusionary rule also protects the integrity of the courts. To admit evidence obtained in violation of the Fourth Amendment is to "participate in and condone lawless activities by law enforcement officers." *Elkins*, 364 U.S. at 220 (quotation omitted).

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, *or in some circumstances recurring or systemic negligence*.

Herring v. United States, 555 U.S. 135, 144 (2009) (emphasis added). Suppression of the evidence "turns on. . .the gravity of government overreach and the deterrent effect of applying the [exclusionary] rule." *Wicks*, 73 M.J. at 103 (citing *Herring*, 555 U.S. at 137).

Application of the exclusionary rule is determined on a case-by-case basis. *See Wicks*, 73 M.J. at 104; *Herring*, 555 U.S. at 141. "The flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule." *United States v. Leon*, 468 U.S. 897, 911 (1984). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis v. United States*, 564 U.S. 229, 238 (2011).

On these standards, the parties agree. However, the parties disagree on whether: (1) the exclusionary rule applies to commanders or those acting like commanders; (2) the agents' conduct was more than "simple" negligence; and (3) the benefits of suppression outweigh the costs to the military justice system. The answer to all three of these issues is "yes." Accordingly, the NMCCA's decision was correct in law and fact. Under the "abuse of discretion" standard for reviewing the NMCCA's decision, this Court must affirm the NMCCA's decision. *Armstrong*, 54 M.J. at 54.

A. The exclusionary rule should apply to commanders (or those acting as commanders) as well as law enforcement agents.

Under *United States v. Queen*, 26 M.J. 136, 141-42 (C.M.A. 1988), this Court has determined commanders are more akin to law enforcement agents than to judges or magistrates. Commanders cannot be equated constitutionally to magistrates or other judicial officers. *United States v. Morris*, 28 M.J. 8, 12

(C.M.A. 1989); *United States v. Stuckey*, 10 M.J. 347, 361 (C.M.A. 1981). "Commanders have responsibilities for investigating crime and enforcing the law that magistrates and judges do not have." *Id*. at 359. If the exclusionary rule applies to actual commanders with actual authority to grant search and seizure authorizations, then logically it also applies to those who act like commanders, but who do not actually have authority to grant search and seizure authorizations under Mil. R. Evid. 315. As the NMCCA correctly noted, the need for deterrence exists to prevent commanders from improperly delegating authority they cannot delegate, and to prevent officers from exercising authority they do not possess (JA 24). Implicit in the NMCCA's ruling was a finding that Lt Col BW acted in a culpable manner by delegating his authority to grant search and seizure authorizations to Maj CB, in direct violation of *Kalscheuer*.

If this Court does or does not extend the exclusionary rule to commanders, NMCCA is not prohibited from including best practices and guidance in its rulings. And thus, its decision of the deterrent effect to commanders is not inappropriate. Lieutenant Colonel BW essentially went rogue in delegating his authority to Maj CB, which she exercised with unwarranted impunity. Neither of them consulted with a judge advocate about Maj CB's authorities during Lt Col BW's deployment (JA 24). Nor did Maj CB consult with a judge advocate about whether she should act on SA Perez's requests for authorizations (*id*.).

Another reason to apply the exclusionary rule to Maj CB's conduct is that she took on a law enforcement role in actively assisting the agents with gathering evidence by tricking MSgt Armendariz into returning to MCAS Miramar. "Even when there is a warrant, evidence should be suppressed when the issuing authority fails to act in a neutral and detached manner." *Queen*, 26 M.J. at 141 (quoting *Lo-Ji Sales v. New York*, 442 U.S. 319, 326 (1979)). Whether the issuing authority maintain a neutral and detached manner is reviewed from an objective, not subjective, standard. *Lo-Ji Sales*, 442 U.S at 327. "When the military commander becomes personally involved as an active participant in the gathering of evidence or otherwise demonstrates…involvement in the investigative…process against the accused, that commander is devoid of neutrality…." *United States v. Ezell*, 6 M.J. 307, 318-19 (C.M.A. 1979).

Maj CB became personally involved as an active participant with gathering evidence by ordering MSgt Armendariz, at the agents' behest, to return to "work" at MCAS Miramar (JA 109). She engaged in subterfuge by telling him he needed to return for the purpose of "work" (*id.*). The *real* reason Maj CB wanted MSgt Armendariz to return was to assist the agents in the execution of her July 25, 2016 authorizations by making it easy for them to obtain evidence from MSgt Armendariz, his clothing, his phones, and his vehicle (JA 104). She also assisted the agents by keeping a written log of the times MSgt Armendariz was contacted,

who contacted him, and whether the contact was a phone call or a text message (JA 105). This belies Appellant's claim that the exclusionary rule should not apply to Maj CB because it applies only to "law enforcement conduct" (Gov. Br. at 31).[5]

Finally, "regardless of who drafts the authorization it is the [commander]'s responsibility to ensure particularity, [such that searches do not become] so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent." *United States v. Morales*, 77 M.J. 567, 575 (Army Ct. Crim. App. 2017) (citing *United States v. Richards*, 76 M.J. 365, 370 (C.A.A.F. 2017)). Major CB's and Lt Col BW's authorizations for searches and seizures of "any vehicle" and "any phone for all data contained therein" belonging to MSgt Armendariz lacked particularity, and as the NMCCA noted, constituted the types of "general" warrants prohibited by the Fourth Amendment (JA 25-28).

B. The agents' misconduct was deliberate, reckless, or grossly negligent, or involved recurring or systemic negligence.

This Court should be gravely concerned about Appellant's arguments that the agents did "nothing wrong," or if they did, they acted with "simple" negligence (Gov. Br. 27-32). Considering: at least one agent in this case, SA Perez, has a

[5] The Government may try to argue this issue is waived under *Perkins*, 78 M.J. 381, 389-90 (C.A.A.F. 2019). To the contrary, Maj CB's loss of neutrality is not "waived," it is raised in direct response to the Government's claim that the exclusionary rule does not apply to "commanders" because it only applies to "law enforcement" conduct. *Id*. at 391 (Ohlson, J. dissenting).

history of Fourth Amendment violations; his history resulted in suppression of evidence in another case, *Tienter*, 2014 CCA Lexis 700; MSgt Armendariz's case involves the same Fourth Amendment violations as in *Tienter*, in the same location, with the same agent; suppression of evidence in *Tienter* obviously did not result in appreciable deterrence of future Fourth Amendment violations; and additional violations of the Fourth Amendment occurred in this case, the NMCCA was justified in holding that the evidence obtained as a result of the Fourth Amendment violations in this case should be suppressed.

"A warrant or search authorization must describe 'with particularity' the place to be searched and the items to be seized. This protects a person from the unreasonable rummaging through one's personal belongings prohibited under the Fourth Amendment." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). "General warrants. . .are prohibited by the Fourth Amendment because they permit officers to engage in a general, exploratory rummaging in a person's belongings." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). Requests to search and seize smart phones are subject to the particularity requirement of the Fourth Amendment. *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014).

"A search must conform to the scope authorized, as an authorization to search does not give rise to an open-ended license to rummage for anything of evidentiary value. Granting such general power would violate the Fourth

Amendment's requirement that warrants describe with particularity those areas to be searched and items seized." *Marron v. United States*, 275 U.S. 192, 196 (1927). "When a magistrate limits the scope of a search to evidence of a particular crime, a search for evidence pertaining to an unrelated crime is beyond the scope of the warrant." *Tienter*, 2014 CCA Lexis 700, *9 (citing *Marron*, 275 U.S. at 196) (holding that SA Perez violated the Fourth Amendment by searching a cell phone for evidence related to sexual assault, when he was only authorized to search the phone for evidence related to a drug crime).

Evidence should be suppressed "if it can be said that the law enforcement officer[s] had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987) (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)). In this case, based on being named in *Tienter*, SA Perez knew, or should have known, the July 25-26, 2016 authorizations for MSgt Armendariz's phones were unconstitutional under the Fourth Amendment for being "general" authorizations. He also knew, based on *Tienter*, that his seizure of MSgt Armendariz's Samsung Galaxy phone and search of the phone for evidence related to sexual assault exceeded the scope of the authorization to seize an iPhone with a cracked screen and search it for evidence of "obstruction of justice." Special Agent Perez's failure to testify during the motion to suppress suggests that

knowledge of his history of Fourth Amendment violations may be properly chargeable to the other agents and to the trial counsel who litigated the motion.

"Omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate, are prohibited by the Fourth Amendment." *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)). Before seeking the search authorization from Lt Col BW, four months after agents already search and seized the evidence in MSgt Armendariz's case, SA BB failed to inform Lt Col BW that MSgt Armendariz's Samsung Galaxy phone was searched on August 12, 2016 and yielded negative results. Had SA BB informed Lt Col BW that the earlier search of the Samsung Galaxy phone yielded negative results, he would not have had probable cause to authorize a search of that phone. The NMCCA correctly considered these factors in addressing the Government's argument regarding inevitable discovery (JA 22), and in conducting its cost/benefit analysis in applying the exclusionary rule.

The NMCCA also correctly considered the careless drafting of the requests for the search and seizures authorizations and the authorizations themselves in finding that suppression of the evidence in this case will deter sloppy drafting, cut and paste errors, and general requests (JA 24-28). The NMCCA's discussion of the misspelling of MSgt Armendariz's first name was only one small part of the

broader problem that appeared to be minimal, if any, thought was put into drafting the requests and authorizations, which indicates minimal, if any, thought was put into granting them. Correctly spelling a suspect's name is a basic task requiring minimal effort. The misspelling of MSgt Armendariz's first name throughout all of the paperwork is indicative of the kind of procedural rubber-stamping frowned upon in *United States v. Perkins*, 78 M.J. 381, 392 (C.A.A.F. 2019) (Ohlson, J. dissenting).

Considering Maj CB's lack of authority to authorize the searches; her active participation in a subterfuge to assist the agents in obtaining evidence against MSgt Armendariz; SA Perez's history of Fourth Amendment violations; the agents' bad faith in searching areas of MSgt Armendariz's office they could not reasonably expect to find evidence (refrigerator and ceiling tiles) (JA 212); the agents exceeding the scope of Maj CB's verbal authorization for the search of MSgt Armendariz's vehicle; the agents exceeding the scope of the July 26, 2016 search authorization by seizing a Samsung Galaxy phone that did not match the description of the "hidden" iPhone with a cracked screen; the lack of probable cause to seize and search MSgt Armendariz's Samsung Galaxy phone, which was searched anyway and yielded "negative results" (JA 209); SA BB's failure to brief LtCol BW about this exculpatory information; and the agents' failure to seek an authorization from Col S or the base commander as an alternative to Maj CB, the

NMCCA did not err in applying the exclusionary rule to all of the evidence seized from MSgt Armendariz, his phones, vehicle, office, and wall locker.

C. The benefits of suppression outweigh the costs to the military justice system.

The obvious benefit, which Appellant wants this Court to overlook, is that suppression of the evidence will force commanders and agents to change the way they do business. It will also encourage commanders and agents to consult with their respective judge advocates. *Tienter* should have been a wake-up call for SA Perez to be more particular in his requests for search and seizure authorizations, especially for phones. The lack of a deterrent effect in *Tienter* requires an even stronger response in the case at bar.

As defense counsel and military judge noted during the hearing, suppression of the evidence in MSgt Armendariz's case is not case-dispositive (JA 145, 154-55). Master Sergeant Armendariz is not "going free" because physical evidence has been suppressed. The NMCCA affirmed his conviction for "fraternization" with the alleged victim and authorized a rehearing on the charges and specifications affected by its suppression of the evidence (JA 32).

That a successful prosecution is more difficult for the Government to obtain, due to the lack of physical evidence in addition to an alleged victim's testimony, is less costly than if the physical evidence was the sole evidence to support the Government's case. There are a multitude of cases where the Government has

court-martialed various accused for sexual assault crimes without *any* physical evidence to corroborate the alleged victim's testimony. If Appellant chooses not to retry MSgt Armendariz, then that is a result of the Government's choice, not a result of judicial action by the NMCCA in suppressing the evidence.

This Court should also consider the costs to the military justice system if the evidence is not suppressed in this case. If this Court reverses the NMCCA's decision in the case at bar, the Government will take this Court's decision as giving its actors *carte blanche* to trample all over servicemembers' Fourth Amendment rights, particularly in sexual assault cases and cases involving electronic media. *See Wicks*, 73 M.J. 93; *United States v. Kelly*, 72 M.J. 237 (C.A.A.F. 2013) (Government unlawfully searched wounded Soldiers' computers at the Joint Personnel Effects Depot under the guise of conducting "inspections"). Given Appellant's argument that no one did anything wrong, or if they did, it was a "simple" mistake not worthy of future deterrence, there is no reason to believe the Government will change its ways on its own.

Finally, there is the cost not just to MSgt Armendariz, but also to the millions of men and women who serve in the military, fighting to defend our constitutional rights. As Justices Brennan and Marshall noted in their dissent in *Leon*:

> [W]hat the Framers understood then remains true today -- that the task of combating crime and convicting the guilty will in every era seem of

> such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms.
>
> If those independent tribunals lose their resolve, however, …and give way to the seductive call of expediency, the vital guarantees of the Fourth Amendment are reduced to nothing more than a "form of words." *Silverthorne Lumber Co*. v. *United States*, 251 U.S. 385, 392 (1920).

468 U.S. at 929-930 (Brennan, J. and Marshall, J. dissenting).

III.

THE NMCCA DID NOT ERR IN FINDING THE GOOD-FAITH EXCEPTION DID NOT APPLY.[6]

Standard of Review

This Court reviews a Court of Criminal Appeals' decision for an abuse of discretion. *Armstrong*, 54 M.J. at 54. On this issue, the NMCCA was aware of facts the military judge was not, and the military judge's findings of fact do not support his erroneous application of the good-faith exception (JA at 294). His application of the "reasonable belief" standard to the first prong of the good-faith exception was also an erroneous conclusion of law (JA 294). This is another reason for this Court to rely on *Armstrong* instead of *Shelton* for its standard of review.

[6] The Government is not arguing the inevitable discovery exception applies.

Argument

A. Military courts cannot add unwritten language to a codified rule.

The good-faith exception to the exclusionary rule is codified at Mil. R. Evid. 311(c)(3). Because it is codified, military courts are not free to add unwritten language to the provision at issue. *United States v. Custis*, 65 M.J. 366, 369-70 (C.A.A.F. 2007) (military judge erred in applying unwritten "fraud on the court" exception to marital communications privilege). "The authority to add [language] to the codified [rules of evidence]…lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government." *Id*. at 369; Article 36(a), UCMJ. Due to the plain language in Mil. R. Evid. 311(c)(3)(A) for the authorizing official to actually have legal authority to grant search and seizure authorizations, it would be error as a matter of law to add an unwritten "reasonable belief" standard into the first prong of the good-faith exception. *Id*.; *see also United States v. Davis*, 61 M.J. 530, 536 (Army Ct. Crim. App. 2005) (military judge erred in applying unwritten crime-fraud exception to marital communications privilege); *JM v. Payton-O'Brien*, 76 M.J. 782, 787 (N-M. Ct. Crim. App. 2017) (error for the military judge to apply the former "when constitutionally required" exception to JM's behavioral health records).

To insert an unwritten exception into a codified exception will cause instability in military law by eliminating a bright-line rule and replacing it with a murky

"reasonable" standard that will take years of litigation to define. "Military law requires more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military justice system who need specific guidance" on what is and is not authorized. *United States v. Tipton*, 23 M.J. 338, 343 (C.M.A. 1987). Adding an unwritten "reasonable belief in authority" exception will also erode the individual liberty and privacy protections that are supposed to be guaranteed by the U.S. Constitution and guarded, not eroded, by the courts. *Leon*, 468 U.S. at 929-930 (Brennan, J. and Marshall, J. dissenting).

This Court also expressed concern about the erosion of Fourth Amendment safeguards when commanders delegated their search and seizure authority to others, without having to meet any standards of competency for the person to whom authority would be delegated. *Kalscheuer*, 11 M.J. at 375-76. As it did in *Kalscheuer*, this Court needs to draw the line on the Government's attempts to erode the protections of the Fourth Amendment, not just for MSgt Armendariz, but also every single servicemember subject to a criminal investigation. If unlawfully seized evidence can be admitted a trial based simply on an agent's specious "belief" they obtained search and seizure authorizations from someone who turned out not have any legal authority, then the good-faith exception swallows the

exclusionary rule entirely, and military justice will revert back to pre-*Kalscheuer* times.

B. The NMCCA correctly noted there was no precedent, not even in *United States v. Perkins*, 78 M.J. at 387, for the Government's position that the "reasonable belief" standard extends to the first prong of the good-faith exception to the exclusionary rule.

The NMCCA's decision on this issue was not arbitrary or erroneous, and was reasonable because the law as it existed (and still exists) at the time of its decision did not permit extension of the "reasonable belief" standard to the first prong of the good-faith exception. The lower court correctly noted *Perkins* only addressed the second prong of the good-faith exception regarding a "substantial basis" for determining the existence of probable cause (JA 18), which is viewed from the perspective of law enforcement agents under a "reasonable belief" standard. *United States v. Carter*, 54 M.J. 414, 422 (C.A.AF. 2001). There are circumstances when agents can never "reasonably" believe probable cause exists. *United States v. Hoffmann*, 75 M.J. 120, 126-27 (C.A.A.F. 2016) (an "intuitive relationship" between "child enticement" and possession of child pornography is an inferential fallacy that cannot support a finding of probable cause); *Leon*, 468 U.S. at 915 (citing *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

In contrast to second prong of the good-faith exception, the first prong does not contain any "substantial basis" language. Mil. R. Evid. 311(c)(3)(A). The lack

of "substantial basis" language in the first prong precludes the military courts from applying the "reasonable belief" standard to it. *Custis*, 65 M.J. at 369-70.

"When interpreting the good-faith exception to the exclusionary rules, the Court's duty is to construe the statute in a manner consistent with the Fourth Amendment." *United States v. Harris*, 5 M.J. 44, 62 (C.M.A. 1978). The good-faith exception was added to the Military Rules of Evidence in 1986, based on *Leon*, 468 U.S. 897 and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). Manual for Courts-Martial (2016 ed.), Drafter's Analysis of Mil. R. Evid. 311(c)(3), Appendix 22 at A22-20 (JA 58). Both *Leon* and *Sheppard* "presuppose that the warrant was issued by a magistrate or judge clothed in the proper legal authority." *United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001). The requirement for the issuing authority, whether that person is a part-time military magistrate, military judge, or an actual commander, to have *actual legal authority* to authorize searches and seizures of evidence for the good-faith exception to apply has been the law for more than 33 years. There is no basis to change this now.

Extending the "reasonable belief" standard to the first prong of the good-faith exception would actually construe the good-faith exception in a manner contrary to the Fourth Amendment and *Kalscheuer*. Such an extension would render the first prong of the good-faith exception a nullity and create a more relaxed standard than *Leon* and *Sheppard*, contrary to the intent of Mil. R. Evid.

311(c)(3) to mirror the civilian rule outlined in *Leon* and *Sheppard*. *Carter*, 54 M.J. at 420 (citing *United States v. Monroe*, 52 M.J. 326, 332 (C.A.A.F. 2000)).

The Government argues that *United States v. Chapple*, 36 M.J. 410, 413 (C.A.A.F. 1993) supports its position that the good-faith exception should apply to authorizations issued by individuals without *any* legal authority to do so (Gov. Br. at 38). However, MSgt Armendariz's case is easily distinguishable from *Chapple*. The biggest distinguishing factor between *Chapple* and MSgt Armendariz's case is that the commander who authorized the search of Chapple's off-base residence in Naples, Italy was actually a commander who had authority to approve searches and seizures generally. *Id*. In contrast, Maj CB was merely an executive officer who had zero authority to grant search and seizure authorizations. An additional distinguishing factor is that the search in *Chapple* occurred in another country, where a Status of Forces Agreement suggested the commander did in fact have legal authority to authorize searches and seizures of evidence of off-base residences. *Id*. at 413. In contrast, the searches and seizures in the case at bar occurred on American soil, on-board MCAS Miramar.

Appellant also cites to cases in ten circuits to support its argument that the good-faith exception applies to authorizations that are void *ab initio* (Gov. Br. at 38-39). These cases are also distinguishable from the case at bar for the same reason *Chapple* is distinguishable—the magistrate in each of those cases had legal

authority to issue warrants. The warrants were void *ab initio* because they authorized searches outside the authorizing official's territorial jurisdiction. In contrast, Maj CB had *zero* legal authority to issue search and seizure authorizations. Her July 25-26, 2016 authorizations would not have legal effect in *any* jurisdiction due to her lack of legal authority. The case at bar is most like the case cited by the NMCCA—*Scott*, 260 F.3d 512. The cases relied upon by the Government also relate to a jurisdictional problem that resulted from Federal Rule of Criminal Procedure 41, a problem that has since been resolved with an amendment that permits magistrates to issue "warrants to use remote access to search electronic media and seize or copy electronically-stored information within or outside the district." Fed. R. Crim. Proc. 41(b)(6).

C. The agents did not "reasonably believe" Maj CB had authority to grant search and seizure authorizations.

As the NMCCA noted, none of the agents involved in the requests for or execution of the July 25-26, 2016 authorizations testified at the motions hearing (JA 20-21). Therefore, the military judge had no factual basis for knowing what, if anything, they believed, much less whether their beliefs were "reasonable." Tellingly, the agents had two judge advocates with whom they could consult as to the legality of obtaining authorizations from Maj CB instead of one of the other two higher-level commanders located at MCAS Miramar (JA 119). Major CB also had a judge advocate with whom she could consult (JA 113, 116). Yet no one

utilized any legal consultation in MSgt Armendariz's case. The peculiar lack of legal consultation suggests that the belief Maj CB was competent to issue authorizations was not objectively "reasonable."

D. For the reasons outlined in *Leon*, the good-faith exception does not apply in this case.

"The good-faith exception does not apply when the authorizing official was not neutral and detached." *Leon*, 468 U.S. at 923; *Lopez*, 35 M.J. at 40. Unlike judicial officers, commanders are not presumed to be neutral and detached. *Stuckey*, 10 M.J. at 361. Commanders are dual-hatted; while they have "judicial authority" to authorize searches and seizures, they are also involved in the "often competitive enterprise of ferreting out evidence of crime." *Ezell*, 6 M.J. at 317-18, 321-22.

"When the military commander becomes personally involved as an active participant in the gathering of evidence or otherwise demonstrates…involvement in the investigative…process against the accused, that commander is devoid of neutrality…," and therefore is disqualified from authorizing searches and seizures of evidence. *Id*. at 318-19. Major CB acknowledged that getting personally involved with the investigation was "inappropriate" (JA 108).

As discussed *supra*, Major CB did in fact become personally involved in the investigation as an active participant by ordering him to return to MCAS Miramar,

at the agents' behest (JA 104-05). Therefore, the good-faith exception does not apply.

"The good-faith exception will not save an improperly executed warrant." *Eppes*, 77 M.J. at 350 n.2 (Ryan, J. concurring); *Leon*, 468 U.S. at 920-21. The good-faith exception also does not apply "to conduct amounting to a deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights." *Davis*, 564 U.S. at 238.

Special Agent Perez, who drafted the search authorizations and submitted the requests to Maj CB for approval, and who searched MSgt Armendariz's vehicle and phone, has a history of deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights, which resulted in the suppression of evidence in another case, *Tienter*, 2014 CCA Lexis 700. The military judge was not aware of *Tienter*. The agents exceeded the scope of Maj CB's July 25, 2016 verbal CASS for MSgt Armendariz's vehicle by seizing two phones and clothing, when she had only authorized a search of his vehicle for the phone plugged into the console. They also exceeded the scope of her July 26, 2016 CASS for an iPhone with a cracked screen by seizing and searching MSgt Armendariz's Samsung Galaxy phone.

Finally, "the good-faith exception will not apply when the authorization 'may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably

presume it to be valid.'" Major CB's authorizations for the searches and seizures of MSgt Armendariz's vehicles and phones failed to particularize the vehicles and phones to be searched or the things to be seized. As previously discussed *supra*, her authorizations were only "general" authorizations in violation of the Fourth Amendment.

Conclusion

For all the aforementioned reasons, this Court should answer the certified issues in the negative.

Respectfully submitted,

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Appendix

1. *United States v. Tienter*, 2014 CCA Lexis 700 (N-M. Ct. Crim. App. Sep. 23, 2014) (unpub. op.)

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains less than 14,000 words.

2. This brief complies with the type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word 2016 with 14 point, Times New Roman font.

Certificate of Filing and Service

I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 7, 2019.

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United States v. Tienter

United States Navy-Marine Corps Court of Criminal Appeals

September 23, 2014, Decided

NMCCA 201400205

Reporter
2014 CCA LEXIS 700 *

UNITED STATES OF AMERICA v. NICHOLAS TIENTER, LANCE CORPORAL (E-3), U.S. MARINE CORPS

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: Review Pursuant to Article 62(b), Uniform Code of Military Justice, 10 U.S.C. § 862(b) [*1] . Military Judge: LtCol L.J. Francis, USMC. Convening Authority: Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.

Core Terms

military, text message, cell phone, authorization, searched, seized, sexual assault, extraction, texts, seizure, plain view, fact finding, law-enforcement, pertaining, messages, suppress, senior

Case Summary

Overview
HOLDINGS: [1]-The agents exceeded the scope of the authorized search at the time of the discovery of the additional texts where nowhere did the search authorization specify searching for evidence of sexual assault; [2]-The military judge did not err by ruling that the plain view exception did not apply where the record indicated that law-enforcement agents only located the text messages by using search terms specifically aimed at finding evidence of sexual assault.

Outcome
Government's appeal denied. Ruling affirmed. Case remanded.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN1 **Judicial Review, Standards of Review**

The United States Navy-Marine Crops Court of Criminal Appeals reviews a military judge's ruling on a motion to suppress for abuse of discretion. The United States Navy-Marine Crops Court of Criminal Appeals reviews the military judge's findings of fact under a clearly-erroneous standard but reviews his conclusions of law de novo. Thus, on a mixed question of law and fact a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.

Military & Veterans Law > Military Justice > Judicial Review > General Overview

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

HN2 **Military Justice, Judicial Review**

When reviewing matters under Unif. Code Mil. Justice art. 62, 10 U.S.C.S. § 862, the United States Navy-Marine Crops Court of Criminal Appeals acts only with respect to matters of law and reviews the military judge's ruling on a motion to suppress in a light most favorable to the prevailing party.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity Requirement

HN3 **Search & Seizure, Probable Cause**

Protecting against unreasonable searches and seizures, the Fourth Amendment provides that no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity Requirement

Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope of Search Warrants

HN4 **Search & Seizure, Warrants**

Even when made pursuant to a warrant, a search must conform to the scope authorized, as an authorization to search does not give rise to an open-ended license to rummage for anything of evidentiary value. Granting such general power would violate the Fourth Amendment's requirement that warrants describe with particularity those areas to be searched and items seized.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN5 **Fundamental Rights, Search & Seizure**

Data stored within a cell phone fall within the Fourth Amendment's protections. As such, evidence obtained from a Government search of cell phone data generally will be inadmissible unless (1) the search was conducted pursuant to a search authorization or warrant, or (2) a recognized exception applies.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity Requirement

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN6 **Search & Seizure, Scope of Protection**

A warrant or search authorization must describe "with particularity" the place to be searched and the items to be seized. This protects a person from the unreasonable rummaging through one's personal belongings prohibited under the Fourth Amendment. Thus, when a magistrate limits the scope of a search to evidence of a particular crime, a search for evidence pertaining to an unrelated crime is beyond the scope of the warrant. Whether police or Government agents are acting within the scope of the warrant depends in large part on the reasonableness of their actions.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope of Search Warrants

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN7[] **Search Warrants, Scope of Search Warrants**

If the scope of the search exceeds that permitted by the terms of a validly issued warrant the subsequent seizure is unconstitutional without more.

Counsel: For Appellant: Capt Cory A. Carver, USMC.

For Appellee: Maj John J. Stephens, USMC; Capt Michael B. Magee, USMC.

Judges: Before F.D. MITCHELL, R.Q. WARD, J.A. FISCHER, Appellate Military Judges. Chief Judge MITCHELL and Judge FISCHER concur.

Opinion by: WARD

Opinion

OPINION OF THE COURT

WARD, Senior Judge:

This case is before us on a Government interlocutory appeal pursuant to Article 62, Uniform Code of Military Justice.[1] The appellee, Lance Corporal Nicholas W. Tienter, U.S. Marine Corps, is currently charged with two specifications of violating Article 120, UCMJ.[2] The Government appeals the military judge's ruling suppressing text messages that law-enforcement agents seized during a search of the appellee's cell phone.[3] Following the military judge's written ruling, trial counsel filed a timely notice of appeal.[4]

After carefully considering the record of the motion hearing, the military judge's ruling, and the submissions of the parties, we find that the military judge did not abuse his discretion [*2] by granting the defense motion to suppress. Accordingly, we deny the Government's appeal and remand this case.

Background

This case arises from an allegation that the appellee engaged in a sexual act with someone who was substantially incapacitated due to alcohol intoxication. The alleged incident occurred in November 2011. The case was referred for trial by general court-martial in September 2013.

In October 2013, the appellee underwent surgery while pending trial. Soon after his surgery, the appellee reported to his command that Corporal (Cpl) S, a fellow Marine in his squadron, had asked him for several of the Percocet pills prescribed to him following surgery. These solicitations came in the form of text messages. In late November 2013, the appellee provided a transcript of some of these text messages to members of his command, who in turn referred the matter to law enforcement.[5]

Based on the appellee's tip, Special Agent (SA) Isaac Perez of the Criminal Investigation Division (CID) sought authorization from the Commanding Officer, MCAS Miramar, to search the appellee's cell phone and seize electronic messages pertaining [*3] to the use and/or possession of prescription medication. In his supporting affidavit, SA Perez stated that after seizing the data from the appellee's cell phone, CID agents would search the data using "search protocols directed exclusively to the identification and extraction of data within the scope of this warrant."[6] SA Perez further stated that this analysis would be completed within 90 days.[7]

On 20 November 2013, the Commanding Officer, MCAS Miramar, authorized SA Perez to search the appellee and seize his cell phone.[8] The military judge found that the scope of the authorized search was limited to "evidence relating to the wrongful use and possession of controlled substances as related to communications between the accused and Cpl [S]" as well as "any

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[1] 10 U.S.C. § 862 (2012).

[2] 10 U.S.C. § 920 (Supp. 2008).

[3] Appellate Exhibit XIX.

[4] AE XXI.

[5] The texts provided by the appellee did not indicate any dates.

[6] AE IX, Appendix A at 6.

[7] *Id.*

[8] *Id.* at 1. Although SA Perez's affidavit references searching the appellee's cell phone for "[c]ommunication between [the appellee] and Cpl [S], wherein Cpl [S] solicits [the appellee] for prescription medication", the command authorization provides no explicit authorization to search the contents [*4] of the cell phone. Rather, it merely authorizes the search of the appellee's person and seizure of his cell phone. The apparent variance between the affidavit and the authorization does not change the outcome of this case.

electronic mails sent or received in temporal proximity to the incriminating electronic mails that provide context to the incriminating mails."[9]

After seizing the appellee's cell phone, SA Perez attached it to a Cellebrite Universal Forensic Extraction Device (UFED), which in turn made a complete digital copy of all data in the cell phone. By selecting various software tools associated with the program, he created a single Portable Document Format (PDF) file containing all text messages retrievable on the cell phone.[10] By using keywords and phrases associated with prescription medication, he located several text messages pertaining to illegal drug use. In addition to these texts, SA Perez also discovered one text wherein the appellee admitted to adultery. SA Perez then drafted an investigative report documenting his search and the aforementioned text messages.[11]

Several months later, the senior trial counsel at MCAS Miramar notified SA Perez that she had located a text message in the extraction file pertaining [*5] to the sexual assault offenses then pending trial. She asked SA Perez to go back and search the same extraction file for any additional text messages that may relate to the appellee's pending sexual assault charges.[12]

SA Perez, with the assistance of SA Stemen of the Naval Criminal Investigative Service (NCIS) and using search terms specific to the sexual assault allegations, discovered several additional text messages which formed the basis of the defense motion to suppress.[13] Even though more than 90 days elapsed since the search authorization had been granted, SA Perez did not seek an additional search authorization.

Standard of Review

HN1[] We review a military judge's ruling on a motion to suppress for abuse of discretion.[14] We review the military judge's findings of fact under a clearly-erroneous standard but we review his conclusions of law de novo.[15] "Thus, on a mixed question of law and fact . . . a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions [*6] of law are incorrect."[16]

HN2[] When reviewing matters under Article 62, UCMJ, we act only with respect to matters of law and we review the military judge's ruling on a motion to suppress in a light most favorable to the prevailing party, here the appellee.[17]

Applicable Law

HN3[] Protecting against unreasonable searches and seizures, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[18]

HN4[] Even when made pursuant to a warrant, a search must conform to the scope authorized, as an authorization to search does not give rise to an open-ended license to rummage for anything of evidentiary value. Granting such general power would violate the Fourth Amendment's requirement that warrants describe with particularity those areas to be searched and items seized.[19]

HN5[] Data stored within a cell phone fall within the

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[9] AE XIX at 4-5 (internal quotation marks and parentheses omitted) (quoting AE IX, Appendix A, at 13).

[10] Record at 33-34.

[11] *Id.* at 34-35.

[12] *Id.* at 36.

[13] SA Perez and SA Stemen searched the extraction file first using the names of the appellee, witnesses and the alleged victim before using keywords and searches such as "[o]n top, oral sex [and] blow job". *Id.* at 52-53.

[14] *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011).

[15] *Id.* (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

[16] *Ayala*, 43 M.J. at 298.

[17] *Id.* at 288 (citations omitted).

[18] U.S. CONST. amend. IV.

[19] *See Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231, Treas. Dec. 42528 (1927) (holding that particularity requirement of Fourth Amendment prevent general searches and "prevents seizure of one thing under a warrant describing another."); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (finding that one of the constitutional protections afforded by the Fourth Amendment is a prohibition against "a general, exploratory rummaging [*7] in a person's belongings." (Citations omitted)).

Fourth Amendment's protections.[20] As such, evidence obtained from a Government search of cell phone data generally will be inadmissible unless (1) the search was conducted pursuant to a search authorization or warrant, or (2) a recognized exception applies.

Discussion

Following the motion hearing, the military judge issued a written ruling wherein he made numerous findings of fact. For the most part, the parties agree with his findings. The Government alleges, and the defense concedes, that the military judge made at least one finding of fact that was clearly erroneous.[21] We find the remaining findings fairly supported by the record and utilize them for purposes of our analysis. We do not add findings of fact or substitute our own interpretation of what happened - we merely strike the erroneous finding and apply the appropriate legal tests to the remaining facts.[22]

We conclude, as did the military judge, that [*9] the agents involved exceeded the scope of the authorized search at the time of the discovery of the additional texts and therefore the plain view exception does not apply.

1. Lawful Scope of the Search

HN6[] A warrant or search authorization must describe "with particularity" the place to be searched and the items to be seized. This protects a person from the unreasonable "rummaging through one's personal belongings" prohibited under the Fourth Amendment.[23] Thus, when a magistrate limits the scope of a search to evidence of a particular crime, a search for evidence pertaining to an unrelated crime is beyond the scope of the warrant.[24] Whether police or Government agents are acting within the scope of the warrant depends in large part on the reasonableness of their actions.[25]

The search authorization issued in November 2013 allowed SA Perez to search the appellee's cell phone data for any electronic communications between the appellee and Cpl [S] relating to use and possession of a controlled substance.[26] No mention of any other crime is made. [*10]

During SA Perez's original search of the cell phone data, he only discovered one text message unrelated to illegal drug use, and that message related to adultery. At the motions hearing, he admitted that had he come across the additional texts during his original search, he would not have interpreted them as evidence of a sexual assault.[27] Only months later did SA Perez re-examine the extraction file with the aid of SA Stemen for any additional evidence of sexual assault. Last, and perhaps most significant, is that nowhere did the search authorization specify searching for evidence of sexual assault.

Under these circumstances, we agree with the military judge that the agents exceeded the scope of the search and accordingly lacked probable cause to seize these

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[20] *Riley v. California*, 134 S. Ct. 2473, 2494-95, 189 L. Ed. 2d 430 (2014). *See also United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014) ("Therefore, cell phones may not be searched without probable cause and a warrant unless the search and seizure falls within one of the recognized exceptions to the warrant requirement." (Citations omitted)).

[21] The military judge found that law-enforcement [*8] agents used the Cellebrite machine three times when in fact SA Perez only use the Cellebrite machine to extract data from the appellee's cell phone once on 21 November 21. AE XIX at 5, 7; Record at 32-33. We find this error immaterial as the military judge's ruling was predicated on the scope of the searches occurring after the cell phone data were seized. His findings on that matter are comprehensive and well-supported by the record. The Government also takes issue with the absence of findings regarding the senior trial counsel's role in searching the .pdf file and discovering one of the text messages at issue. The record could support a finding that it was the senior trial counsel who prompted law-enforcement agents to search the data for evidence of sexual assault as part of a "separate investigation" from the drug case. Record at 36. But the military judge omitted any such finding and we are not permitted to supplement his ruling with our own findings in reviewing a Government appeal. We are not convinced that his omission was clearly erroneous. Nor would further fact-finding on the senior trial counsel's involvement affect the outcome in this case.

[22] *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

[23] *Coolidge,* 403 U.S. at 467.

[24] *Marron*, 275 U.S. at 196; *see also United States v. Decker,* 956 F.2d 773, 778 (8th Cir. 1992) (holding that warrant authorizing seizure of UPS package suspected to contain drugs did not authorize seizure of drugs and drug paraphernalia from the premises).

[25] *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008).

[26] AE XIX at 4-5.

[27] Record at 50.

additional text messages. Even if, as the Government contends, the search authorization might reasonably have permitted SA Perez to "review[] all of the texts messages by reading every page of the PDF," in his search for drug evidence,[28] the authorization did not permit a search for evidence pertaining to sexual assault. Therefore, the agents could lawfully seize the additional text messages only if they were in plain [*11] view.

2. Plain View Exception

We conclude that the military judge did not err by ruling that the plain view exception did not apply. The Government argues that these additional text messages were in plain view because they were contained in the same raw data file as the text messages related to prescription medication. But SA Perez did not discover these text messages during his original search for drug-related communications, despite finding one unrelated message concerning adultery. It does not follow that one piece of data is in plain view simply because it is co-located with another piece of data somewhere within 2,117 pages of material.[29] To the contrary, the record indicates that law-enforcement agents only located these text messages by using search terms specifically aimed at finding evidence of sexual assault.

Under these facts, we agree with the military judge that agents exceeded the scope of the [*12] search authorization in searching the extraction report for evidence of sexual assault. Since the plain view doctrine requires that law-enforcement agents act within the scope of the authorization at the time of discovery, the doctrine is inapplicable under the facts of this case.[30]

Conclusion

The appeal of the United States is hereby denied. The military judge's ruling is affirmed and the record of trial is returned to the Judge Advocate General for remand to the convening authority and delivery to the military judge for further proceedings.

Chief Judge MITCHELL and Judge FISCHER concur.

End of Document

[28] Appellant's Brief of 27 Jun 2014 at 13.

[29] The military judge found that "[t]he extraction report consists of 2117 pages of material collected from the [appellee's] cellular phone to include numerous texts messages most [of] which are unrelated to the [appellee's] conversations with Cpl [S]." AE XIX at 6.

[30] *See Horton v. California*, 496 U.S. 128, 140, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (***HN7***[⬆] "If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . the subsequent seizure is unconstitutional without more."); *United States v. Fogg*, 52 M.J. 144, 149 (C.A.A.F. 1999). We also note that the second requirement of the plain view doctrine, i.e. that the evidence's "incriminating nature must also be immediately apparent" also appears unmet in light of SA Perez's initial inability to find these additional texts and his testimony that he would not have readily recognized these texts as evidence of sexual assault had he found them during his initial search. *Id.* at 136-37 (internal quotation marks and citations omitted).